Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

22 May 2014*

(Appeal — Competition — Agreements, decisions and concerted practices — Plastic industrial bags market — Attribution to the parent company of the infringement committed by the subsidiary — Obligation to state reasons)

In Case C-36/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 January 2012,

Armando Álvarez SA, established in Madrid (Spain) represented by M. Troncoso Ferrer, E. Garayar Gutiérrez and C. Ruixo Claramunt, abogados,

appellant,

the other party to the proceedings being:

European Commission, represented by F. Castilla Contreras and F. Castillo de la Torre, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, President of the Chamber, E. Levits, and M. Berger (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2014,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Armando Álvarez SA ('Armando Álvarez') asks the Court to set aside the judgment of the General Court of the European Union in Case T-78/06 *Álvarez* v *Commission* EU:T:2011:673 ('the judgment under appeal') by which the General Court dismissed its action for annulment in part of

* Language of the case: Spanish.

Commission Decision C(2005) 4634 final of 30 November 2005 relating to a proceeding pursuant to Article 81 [EC] (Case COMP/F/38.354 — Industrial bags) ('the decision at issue') and for annulment or, in the alternative, reduction of the fine which was imposed upon it by that decision.

Background to the dispute and the decision at issue

2 Armando Álvarez is a limited company governed by Spanish law which has developed industrial activities in various sectors, including the manufacture of metal drums, industrial joinery and the sale of timber. It owns a number of subsidiaries, including Plásticos Españoles SA (ASPLA) (hereinafter 'ASPLA'), in which, in 2002, it held 98.6% of the shares.

3 In November 2001, British Polythene Industries plc informed the Commission of the European Communities of the existence of a cartel in the industrial bags sector ('the cartel').

4 After carrying out inspections in June 2002, the Commission initiated the administrative procedure on 29 April 2004 and adopted a statement of objections against several companies, including ASPLA and Armando Álvarez.

5 On 30 November 2005, the Commission adopted the decision at issue, Article 1(1)(j) of which states that ASPLA and Armando Álvarez infringed Article 81 EC by participating from 8 March 1991 until 26 June 2002 in a complex of agreements and concerted practices in the plastic industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands; this consisted in the fixing of prices and the establishment of common price calculation models, the sharing of markets and the allocation of sales quotas, the assignment of customers, deals and orders, the submission of concerted bids in response to certain invitations to tender and the exchange of individualised information.

6 On that ground, the Commission, in point (h) of the first paragraph of Article 2 of the decision at issue, imposed on ASPLA and Armando Álvarez a fine of EUR 42 million, for which amount those two companies were held jointly and severally liable.

The judgment under appeal

7 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 24 February 2006, Armando Álvarez brought an action challenging the decision at issue. In that action it sought, in essence, annulment of the decision at issue in so far as it concerned it or, in the alternative, reduction of the fine imposed on it by the Commission.

8 In support of its action, Armando Álvarez put forward a single plea in law alleging an error of assessment as to the facts and failure to observe the presumption of innocence and the rights of the defence.

9 The General Court dismissed the action in its entirety.

Forms of order sought and proceedings before the Court of Justice

10 Armando Álvarez claims that the Court should:

— set aside the judgment under appeal and annul the decision at issue; and

— order the Commission to pay the costs.

11 The Commission contends that the Court should:

— dismiss the appeal; and

— order Armando Álvarez to pay the costs.

12 By decision of the President of the Sixth Chamber of the Court of Justice of 15 May 2013, the proceedings in the present appeal were suspended until conclusion of the proceedings in Case C-40/12 P *Gascogne Sack Deutschland* v *Commission* EU:C:2013:768, Case C-50/12 P *Kendrion* v *Commission* EU:C:2013:771 and Case C-58/12 P *Groupe Gascogne* v *Commission* EU:C:2013:770. The proceedings resumed following delivery of the judgments in those cases on 26 November 2013.

The appeal

The main plea in law

Arguments of the parties

13 Armando Álvarez argues that in the judgment under appeal the General Court attributed liability for the infringement to it on the basis of two grounds which were not included in the decision at issue. In the first place, in paragraphs 38 and 39 of the judgment, the General Court found that the evidence produced by the Commission proved that Armando Álvarez had participated directly in the cartel, which, in the latter's view, did not follow from the recitals to the decision at issue. In the second place, in paragraph 35 of the judgment under appeal, the General Court referred to the presumption that Armando Álvarez, as a parent company owning 100% of the shares in its subsidiary (ASPLA), exercised decisive influence over ASPLA's conduct, although the Commission had not relied on that presumption in the decision at issue.

14 In relying, wrongly, on those two grounds, the General Court, so Armando Álvarez argues, made an error of law and infringed its rights of defence, since it was not able to defend itself against allegations that were not included in the decision at issue.

15 The Commission submits that this plea is unfounded. In the decision at issue, Armando Álvarez's liability was clearly founded upon the presumption that it exercised, in its capacity as a parent company, decisive influence over the conduct of its subsidiary. The decision referred to indicia relating to the actual exercise of such influence on Armando Álvarez's part merely to complement the presumption.

Findings of the Court

16 It should be noted, in this regard, that, in the present case, the Commission referred expressly, in recital 580 to the decision at issue, to the presumption that a parent company in fact exercises decisive influence over a subsidiary in which it owns all the shares, before stating, in recital 584 to that decision, that that approach must be applied on a case-by-case basis for each undertaking concerned (see *Kendrion* v *Commission* EU:C:2013:771, paragraph 28).

17 In the recitals to the decision at issue which deal with ASPLA and Armando Álvarez, the Commission, first, noted, in recital 669 to that decision, that Armando Álvarez owned 98.6% of the shares in ASPLA. Second, it stated, in recital 671 to the decision, that it was clear that Armando Álvarez was very closely involved in the operational management of ASPLA. In support of that statement, the Commission mentioned, in recitals 672 to 676 to the decision, matters, which have been the subject of argument

during the written procedure, relating to the presence of Armando Álvarez's most senior managers at at least 22 meetings of the undertakings which were involved in the cartel and to the fact that, at least on the face of it, representatives from ASPLA sent reports of other meetings to directors of Armando Álvarez.

18 Accordingly, the General Court did not make an error of law when it held, in paragraph 35 of the judgment under appeal, that, on the basis of the case-law relating to the circumstances in which a parent company is presumed to exercise decisive influence over its subsidiary, the Commission was entitled to presume that, in view of the fact that it owned 98.6% of the shares in ASPLA, Armando Álvarez had exercised decisive influence over the conduct of its subsidiary.

19 Nor can Armando Álvarez validly maintain that it was not able to exercise its rights of defence to counter the Commission's use of that presumption. It is in fact apparent from the application which Armando Álvarez lodged before the General Court, in particular from point 19 thereof, that it accepted the existence of that presumption even though it challenged its legality in the light of the presumption of innocence. Its arguments on that point were, moreover, considered in paragraphs 22 to 29 of the judgment under appeal and rejected in paragraph 30 of that judgment.

20 The General Court, in paragraphs 36 and 37 of the judgment under appeal, also correctly examined the arguments put forward by Armando Álvarez to rebut the presumption of actual control arising from the shareholding links between Armando Álvarez and its subsidiary, a presumption on which the Commission had relied. In that examination, the General Court set out the reasons why, in its view, none of those arguments could be accepted.

21 Paragraphs 38 and 39 of the judgment under appeal fall within the same stage of the reasoning developed by the General Court and their import must therefore be appraised in the light of the logical progression of that reasoning.

22 In paragraph 38 of the judgment under appeal the General Court found that the presence, at a number of meetings of the undertakings involved in the cartel, of Armando Álvarez's most senior managers, together with the fact that the latter was informed about the other meetings by reports drawn up by representatives from ASPLA, were sufficient to prove that Armando Álvarez played a direct part in the discussions within the cartel. In paragraph 39 of the judgment under appeal, the General Court considered that the fact that representatives from Armando Álvarez had not, according to the latter, been given authority to take part in the cartel was irrelevant.

23 Contrary to what is maintained by Armando Álvarez, those findings cannot be interpreted as meaning that it was held liable on a new ground entailing direct participation in the cartel. At that stage in its reasoning, the General Court merely assessed the relevance and plausibility of the arguments which Armando Álvarez put forward to rebut the presumption concerned and to challenge the additional indicia which the Commission had taken into account in forming the view that the company had exercised decisive influence over its subsidiary. In the context of its appraisal of the evidence submitted to it, the General Court could quite properly give an indication of the probative value which it was, in its view, appropriate to attribute to the fact, to which the Commission drew attention, that there was an overlap between the managing bodies of the two companies, without that appraisal altering the basis on which liability was attributed to Armando Álvarez.

24 Accordingly, Armando Álvarez has no ground for maintaining that it did not have the opportunity to exercise its rights of defence in respect of a further ground of liability.

25 It follows from the foregoing that Armando Álvarez's main plea in law must be rejected.

The alternative plea in law

Arguments of the parties

26 Armando Álvarez maintains that the error of law made by the General Court in giving judgment on the basis of grounds not raised by the parties to the dispute resulted in a failure to assess the arguments which were actually put forward in the application, with the result that the reasoning in the judgment under appeal is inconsistent and inadequate.

27 According to Armando Álvarez, although the Commission had not referred, in its case, to any presumption that a parent company is liable for the conduct of its subsidiary, the only evidence relied on to establish its influence over its subsidiary was, apart from its shareholding in that subsidiary, the fact that there was some overlap between the members of the boards of directors of the two companies. Before the General Court Armando Álvarez had argued that that evidence was insufficient and had relied on other grounds in order to argue that liability should not have been attributed to in the context of the cartel. The General Court failed to undertake any assessment of those arguments.

28 The Commission contends that the alternative plea is unfounded.

Findings of the Court

29 As a preliminary point, it should be noted that the alternative plea put forward by Armando Álvarez is based on the premiss that the Commission did not rely, in the decision at issue, on the presumption that the parent company exercised decisive influence over a subsidiary in which it owned all, or virtually all, the shares. As is apparent from paragraphs 16 to 19 of this judgment, that premiss is incorrect.

30 Furthermore, it follows from paragraphs 20 to 22 of this judgment that, contrary to what is maintained by Armando Álvarez, the reasoning in the judgment under appeal, so far as concerns the examination of the arguments which Armando Álvarez had advanced to rebut the presumption that it had exercised decisive influence over its subsidiary, is not at all inconsistent.

31 In so far as Armando Álvarez submits, in the context of its alternative plea, that the General Court breached its obligation to state the reasons in failing to address each of the arguments which Armando Álvarez had put forward to rebut the presumption of actual exercise of decisive influence, it should be observed that, according to the settled case-law of the Court of Justice, the obligation on the General Court, under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union, to state the reasons on which its judgments are based does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case (*Groupe Gascogne* v *Commission* EU:C:2013:770, paragraph 37).

32 The General Court examined Armando Álvarez's arguments at paragraphs 36 and 37 of the judgment under appeal. Whilst there is only a brief explanation as to why certain of those arguments — such as those based on the nature of the two companies' industrial activities, their economic value, the use of external managers and on Spanish company law — were rejected, the fact remains that it is sufficient to enable Armando Álvarez to ascertain the reasons on which the General Court relied. It can be seen from those paragraphs that the General Court considered that those factors were not such as to call in question the probative value of the evidence — such as the role played by the most senior managers of Armando Álvarez with regard to the operation of the two companies and the practical effects of the fact that the composition of their boards of directors was largely identical — on which the Commission had relied to support the presumption that, in view of the fact that virtually all the shares in ASPLA were owned by Armando Álvarez, the latter could be presumed to have exercised decisive influence over its subsidiary.

33 In so far as Armando Álvarez seeks to challenge the General Court's appraisal of the facts and of the evidence produced before it, suffice it to observe that, save where the rules on the burden of proof and the taking of evidence have not been observed or the evidence has been distorted, such an appraisal does not constitute a point of law which is subject, as such, to review by the Court of Justice (Case C-238/12 P *FLSmidth* v *Commission* EU:C:2014:284, paragraph 31 and the case-law cited).

34 In view of the foregoing considerations, the alternative plea put forward by Armando Álvarez must be rejected.

35 Since neither of the pleas in law put forward by Armando Álvarez in support of its appeal can be upheld, the appeal must be dismissed.

Costs

36 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

37 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Armando Álvarez has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission.

On those grounds, the Court (Sixth Chamber) hereby

1. Dismisses the appeal;

2. Orders Armando Álvarez SA to pay the costs of this appeal.

[Signatures]